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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHIRLEY HARRELSON, Plaintiff and Appellant, v. BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, Defendant and Respondent.	G049855 (Super. Ct. No. 30-2012-00608968) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Richard J. Silber for Plaintiff and Appellant.

David H. Lantzer for Defendant and Respondent.

* * *

Defendant and Respondent Board of Retirement of the Orange County Employees Retirement System denied the application of plaintiff and appellant Shirley Harrelson for disability retirement. Thereafter plaintiff filed a petition for writ of mandate challenging that decision. She now appeals the judgment denying that petition, contending the judgment was not supported by substantial evidence and defendant's medical expert was biased. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff was a permanent employee of the Orange County Public Defender's office (Employer) from January 1990 through early October 2001 as an office technician. The job description required her to spend the vast majority of her time keyboarding.

Beginning in March 1991, plaintiff began reporting injuries and medical conditions, including pain and numbness in her right hand and wrist due to computer use, and pain in her neck caused by listening to the tapes she transcribed. During the next several years she reported additional problems with her left arm and hand and her neck and shoulders.

In December 1998, plaintiff was awarded workers' compensation benefits.[1]

Through the fall of 2001, plaintiff was evaluated and treated by several doctors, including Gonzalo A. Covarrubias, M.D., primarily in connection with her workers' compensation claims. Treatments included surgery on her right arm, physical therapy, and medication.

As other problems continued or manifested themselves during this period, beginning in January 1998 plaintiff was often restricted to four or six hours of keyboarding a day, restrictions to which Employer agreed and accommodated. In

[1] Plaintiff had at least three workers' compensation awards during her employment and the pendency of this case, one in 1998 and two in 2010, for injuries to her hands, wrists, upper extremities, neck, and shoulder.

September 2000, Covarrubias reported plaintiff was "actively asking for medical disability retirement."

In July 2001 plaintiff was evaluated by Manuel S. Anel, M.D., in connection with her workers' compensation claim. He reiterated the existing four-hour keyboarding limit. In early October 2001 Anel restricted plaintiff from any computer use. On October 3 Employer advised plaintiff it could not accommodate that restriction and "sent her home." That was the last day plaintiff worked for Employer.

In late October plaintiff told Anel the total restriction was "not practical" because there was no position available with Employer. At her request, Anel reverted back to the four-hour-per-day keyboarding restriction. In November, Employer advised plaintiff it could no longer accommodate that restriction.

In March 2002, Employer met with plaintiff regarding possible accommodation of her restriction. Although it had been able to accommodate the plaintiff for the past several years, this was based on Employer's belief her condition was temporary. Now that it was permanent, there were no regular positions in the office involving only four hours of computer use. Employer explained other positions might be available with the County of Orange.

In August 2002 John H. Freeman, M.D., took over for Anel in connection with plaintiff's workers' compensation claim. He reported plaintiff should be able to keyboard four hours a day with no ill effect.

In May 2002, seven months after Employer sent her home, plaintiff filed an application for disability retirement. In September, plaintiff was seen by Andres Taleisnik, M.D., a certified hand specialist, in an independent examination in connection with that application. He reviewed all her prior medical reports and also examined plaintiff. In his opinion plaintiff was "not permanently incapacitated from her usual job duties." Her conditions "were not truly work related[] with any degree of reasonable

medical probability." Taleisnik advised plaintiff "could return to [her usual and customary job] duties at any point if she so desired" with no restrictions.

While her disability retirement application was pending, in November 2002 plaintiff retired and began receiving her service retirement benefits.

In September 2004, Taleisnik again reviewed the medical reports and examined plaintiff. He reached the same conclusion—that plaintiff's condition was not work related. Plaintiff was not "permanently incapacitated from her usual job duties," an opinion with which plaintiff agreed, and she could "resume her usual and customary job duties without restrictions." "Any limitation's on her ability to perform computer keyboard activities are self-imposed, since there is no evidence of ongoing conditions that would preclude [plaintiff] from performing clerical activities without restrictions."

In June 2005 defendant denied plaintiff's disability retirement claim due to insufficient evidence of permanent incapacity. In September plaintiff requested an administrative hearing to contest the denial.

In October 2009, during the course of the administrative hearing, plaintiff filed an amended application for disability, alleging work-related, cumulative injury to her spine, shoulders, elbows, wrists, and hands. She claimed those injuries "substantially incapacitated" her from performing the "usual and customary" duties of her position because she was restricted to keyboarding four hours per day and as of October 2001 Employer could not accommodate her. In April 2010 defendant denied the second disability retirement claim for the same reason, there was insufficient evidence to show permanent incapacity.

Plaintiff again requested an administrative hearing to contest that denial, which took place in November 2010. Plaintiff testified, and over 1000 pages of evidence were introduced, including medical reports, workers' compensation records, and transcripts from the depositions of Taleisnik.

In April 2012 the administrative hearing officer filed his 65-plus-page "Summary of Evidence, Findings of Fact, Conclusions of Law, and Recommendations" (capitalization omitted), recommending denial of plaintiff's application for disability retirement. He found plaintiff was not "permanently incapacitated from her usual job duties" as of October 2001, i.e., four hours of keyboarding a day.

The hearing officer relied on the report of Freeman, who concluded that if plaintiff was reinstated, she could keyboard for four hours a day. He also cited to Taleisnik's report that plaintiff's condition "develops due to anatomical conditions" and is "rarely truly disabling" when based simply on keyboarding. Taleisnik stated plaintiff could resume normal duties without restrictions, taking anti-inflammatory medications. The hearing officer overruled plaintiff's objection to Taleisnik's reports on the grounds of bias, holding bias goes to the weight of the evidence.

The hearing officer agreed that because Employer had accommodated plaintiff's restricted keyboarding, the modified schedule became her usual and customary duties. He found there was no evidence plaintiff could not work at all. Employer tried to find another position for her and even gave her vocational training. If she could have been employed anywhere by the county, she should not be awarded disability retirement.

Defendant adopted the findings of the administrative hearing officer and denied the disability retirement.

Plaintiff then filed a petition for a writ of administrative mandamus and damages. She alleged that by denying her application for disability, defendant acted in "excess of its jurisdiction" and "committed a prejudicial abuse of discretion" because she "was substantially incapacitated from performing" her duties in her position and employer could not accommodate her. Plaintiff also alleged defendant abused its discretion and failed to proceed in the manner prescribed by law because the finding she was not sufficiently disabled as to be unable to perform what had become her normal

duties was not supported by the weight of the evidence. Plaintiff sought damages in the amount of the benefits that should have been paid to her.

The court independently reviewed the entire administrative record and counsels' arguments and found they supported defendant's decision to deny disability retirement. The evidence confirmed the hearing officer's findings that plaintiff's normal and customary duties were limited to three to four hours of keyboarding a day. The record contained various statements by plaintiff that she could perform those duties. The court found "almost no evidence" plaintiff could not do so. Thus, she was not disabled.

DISCUSSION

1. California Rules of Court Violations

California Rules of Court, rule 8.204(a)(2)(C) requires that an opening brief "[p]rovide a summary of the significant facts." In addition, each issue in a brief must have its own discrete heading summarizing the point and must be supported by reasoned legal argument. (Cal. Rules of Court, rule 8.204(a)(1)B).) Plaintiff consistently violated these rules. Although there are headings in the briefs, facts and argument are mixed indiscriminately throughout, many repeated a number of times under various headings, significantly hindering our review.

Additionally, when referring to the administrative hearing, plaintiff failed to cite to the correct page numbers in the administrative record (Cal. Rules of Court, rule 8.204(a)(1)(C) [reference to anything in record must cite to specific page number]), further complicating our efforts to find substantiation for plaintiff's claims. "[I]t is not our responsibility to scour the appellate record for evidence to support a party's position." (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1270.)

Failure to follow the Rules of Court is a ground for forfeiture of claims. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) Although we decline to deem all the claims forfeited and attempt to address the issues we believe were raised, it may be that we will inadvertently overlook an argument buried in the statement

of facts or statement of the case or under a different topic heading. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 ["we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument"].)

2. Standard of Review

A petition for writ of mandate is proper when there has been a "prejudicial abuse of discretion" in an administrative hearing. (Code Civ. Proc., § 1094.5, subd. (b).) A party shows abuse of discretion if the agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid*.) In challenging the rulings of the hearing officer and the trial court, plaintiff relied on all of these grounds.

If a matter affects the fundamental vested right of a party, when reviewing the administrative record the trial court must exercise its independent judgment. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407.) A public employee's right to a disability pension if she is actually disabled is a fundamental vested right. (*Beckley v. Board of Administration Etc.* (2013) 222 Cal.App.4th 691, 697.)

In exercising its independent judgment, the trial court may "draw its own reasonable inferences from the evidence and make its own credibility determinations." (*Candari v. Los Angeles Unified School Dist.*, *supra*, 193 Cal.App.4th at p. 407.) Nevertheless, it "must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

On appeal, we do not rely on the independent judgment test but instead use the substantial evidence test to review the factual bases of the trial court's decision, not those of the administrative hearing officer. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 218.) We consider "whether the evidence,

viewed in the light most favorable to [defendant], sustains the findings of the trial court, resolving any reasonable doubts in favor of those findings. [Citation.]" (*O'Toole v. Retirement Board* (1983) 139 Cal.App.3d 600, 602.) In so doing, however, we "'"may look to the findings in the [administrative agency's] decision for guidance in determining whether the trial court's judgment is supported by substantial evidence." [Citation.]' [Citation.]" (*Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 796.) Finally, we review questions of law de novo. (*Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204.)

3. Disability Retirement Governing Law

Pursuant to Government Code section 31720 (all further statutory references are to this code), plaintiff was entitled to disability retirement if, in addition to certain other conditions not at issue here, she was "permanently incapacitated for the performance of duty . . . ." Permanent incapacity means "the substantial inability of the applicant to perform his [or her] usual duties." (See *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 [interpreting "incapacity" as used in former § 21022 (now § 21151) as to Public Employees' Retirement System].)

4. No Entitlement to Disability Retirement

a. Plaintiff's Ability to Perform Her Usual and Customary Duties

We concur with the trial court's finding there was substantial evidence to show plaintiff was able to perform her usual and customary duties at the time Employer "sent her home." Both the hearing officer and the court found that on that day, plaintiff's usual and customary duties were limited to four hours of keyboarding per day and that fact is supported by substantial evidence. Plaintiff's keyboarding time had been restricted for over three-and-a-half years and Employer had been able to accommodate her. The mere fact Employer sent plaintiff home, stating it could not accommodate that restriction once it became permanent, is not sufficient evidence to overcome that finding.

According to Freeman, she could keyboard for four hours a day.[2] The doctors on whom plaintiff relied to support her claim concur. In fact, plaintiff herself told Taleisnik she could perform her usual and customary duties; her main concern was that it would cause a flare-up of her conditions. At oral argument, plaintiff's lawyer admitted plaintiff could keyboard four hours per day.

Furthermore, even if plaintiff's usual and customary duties were not limited to four hours of keyboarding per day, Taleisnik reported plaintiff could keyboard all day without any restriction. There was no reason to believe it would aggravate plaintiff's condition because plaintiff's job duties had little to do with the "onset of these conditions in the first place." Taleisnik stated plaintiff did not suffer from a disability that would prevent her from working. Rather, plaintiff was fully capable of performing her job. Taleisnik acknowledged that plaintiff may experience aches and pains but attributed that to aging, not work activities.[3] It follows, then, plaintiff was not "permanently incapacitated."

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[2] Plaintiff makes a summary argument that neither the hearing officer nor the court took into account her workers' compensation awards, claiming the court erred in failing to consider the findings in those actions. Plaintiff's failure to develop this issue with citations and reasoned legal argument is a basis for forfeiting the claim. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852.) Even considering it on the merits, plaintiff acknowledges and the trial court found, a workers' compensation determination is not binding in a disability retirement hearing. (*Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 798-799.) The standards and the public policies of the two systems differ, and the mere fact plaintiff received workers' compensation awards does not entitle her to disability retirement. Moreover the workers' compensation doctors said plaintiff could keyboard four hours per day.

[3] (See *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862 [retirement disability denied; "fact that sitting for long periods of time in a patrol car would 'probably bother [the plaintiff's] back,' does not mean that in fact he cannot so sit"].)

In sum, the evidence supports the trial court's finding that plaintiff was not disabled from performing her usual and customary duties, whether limited to four hours' keyboarding a day or not, and thus she was not entitled to disability retirement.

b. Plaintiff's Remedy

Section 31725 requires that when an application for disability retirement is denied due to lack of proof of physical disability, "the employer *shall reinstate* the member to [her] employment effective as of the day following the effective date of the dismissal" if the employer does not seek timely judicial review of the decision, and has dismissed the employee based on disability. (Italics added.)

However, under section 31725.7, subdivision (b), if "a member retired for service is found not to be entitled to disability retirement he or she shall not be entitled to return to his or her job as provided in [s]ection 31725."

Here, plaintiff emphasizes that Employer "sent her home" and told her it could not accommodate her permanent restriction of four hours of keyboarding a day. She claims this entitled her to disability retirement. But the statutes dictate otherwise.

Defendant, not Employer, had the authority to decide whether plaintiff was incapacitated for performance of her duties.[4] Since defendant determined she was not incapacitated, Employer would have had to reinstate her had she not retried for service. (§§ 31725, 31725.7.)

That a four-hour per day keyboarding restriction, deemed permanent by workers' compensation doctors, might have complicated Employer's scheduling or caused Employer financial hardship is beside the point. Because it did not appeal the

[4] The Employer's Statement of Disability, which states plaintiff has a disability caused by a work injury, is merely Employer's opinion, apparently based purely on plaintiff's reports of injuries. Thus, its statements have no medical or legal foundation. And plaintiff makes no argument as to why these statements carry any weight. Moreover, Employer and defendant are two different parties, only the latter of whom decides whether plaintiff qualifies for disability.

decision plaintiff was not entitled to disability retirement, Employer would have been compelled by section 31725 to take plaintiff back. That was plaintiff's remedy. "[I]f the County and the Retirement Board make inconsistent decisions about an employee's disability status, the County must reinstate the employment." (*Alvarez-Gasparin v. County of San Bernardino* (2003) 106 Cal.App.4th 183, 187; see *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, 1244-1245 ["'Section 31725 recognizes no middle ground'"].) "Section 31725 is a remedial statute. Its purpose is to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the retirement board which leave the employee without retirement income and without income from a job. [Citation.]" (*Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, 1255.)

But plaintiff did not demand her job back and indeed had already voluntarily retired. Therefore, Employer was not required to find her a position. (§ 31725.7, subd. (b).)

We understand plaintiff was left in a difficult position when Employer "sent her home," and we sympathize with her. At oral argument defendant also acknowledged plaintiff's unfortunate situation. But that was an issue between plaintiff and Employer. As noted above, had plaintiff not taken service retirement, she would have been entitled to be rehired. The legality of Employer sending plaintiff home and whether she had any recourse for Employer's failure to accommodate her is not before us, and we have no power to resolve it or fashion a remedy based on that issue.

5. Taleisnik's Alleged Bias

Plaintiff's challenge to Taleisnik's testimony that it was incompetent evidence and was biased lacks merit.

In forming his opinion, Taleisnik relied on medical journals and his own experience. He concluded nothing in "the vast preponderance of the accepted hand surgery literature" or his experience showed any causal connection between plaintiff's

injuries and her alleged disability. Rather, it is an unsupported "assumption" and a "'knee-jerk' response . . . truly without prior medical basis . . . ." The mere fact "conditions may arise and even progress while an individual is working . . . does not imply any causative relationship unless the job duties can be demonstrated" to have caused the condition. Taleisnik concluded there was no evidence plaintiff keyboarding eight hours per day caused any of her conditions.

We reject plaintiff's argument the medical articles to which Taleisnik referred did not mention California's workers' compensation or disability retirement systems and therefore were not relevant to the issue. Medical conditions do not change depending on whether the person afflicted is a claimant or not.

Further, plaintiff's assertion Taleisnik was biased because he had a "pre-conceived medical-legal philosophy" that keyboarding could not have caused her injury is not persuasive. Taleisnik reviewed plaintiff's medical records and personally examined her. Using his medical knowledge he then concluded her conditions were not caused by keyboarding. That his review was conducted after her injuries were incurred does not support a claim of bias. In any event, at best these arguments go to the weight of the evidence. It is the function of the trial court, not an appellate court, to weigh evidence. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 188.)

6. Administrative Record

Defendant's notice of lodgment of a hard copy of the administrative record contains an "objection" to our "unreasonable" order that it be provided and a claim plaintiff should have been required to do so. Defendant requests that we order plaintiff and her counsel to pay costs for copying and the time defendant's staff was required to expend to prepare it. Costs on appeal are determined pursuant to California Rules of Court, rule 8.278.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.